

## EXPLANATORY STATEMENT for

### ASIC Corporations (Amendment and Repeal) Instrument 2016/66

Prepared by the Australian Securities and Investments Commission

#### *Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Amendment and Repeal) Instrument 2016/66 (the **Repeal Instrument**).

The Repeal Instrument will have the effect of repealing the following ASIC Class Orders:

- [CO 04/1574] – *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund ([CO 04/1574]);*
- [CO 06/636] - *Superannuation: Delivery of product disclosure for investment strategies ([CO 06/636]);* and
- [CO 02/968] - *Interim relief from financial reporting obligations for companies in external administration ([CO 02/968])*

The Repeal Instrument is made under subsections 341(1) and 1020F(1) of the *Corporations Act 2001* (the **Act**).

Subsection 341(1) of the Act provides that ASIC may make an order in writing that exempts a specified class of companies, registered schemes or disclosing entities from all or specified provisions of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4) of the Act.

Subsection 1020F(1) of the Act provides that ASIC may:

- (a) exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act;
- (b) exempt a financial product or a class of financial products from all or specified provisions of Part 7.9 of the Act; or
- (c) declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

## 1. Background

[CO 04/1574] provides relief to the trustee of a superannuation fund from application form and cooling-off requirements under the Act in relation to an ‘intra-fund transfer’. An intra-fund transfer involves a change to the composition of a person’s membership within a fund, such as a transfer of member benefits within the same fund) that occurs without the consent of the members of the fund. In 2005, ASIC issued ASIC Class Order [CO 05/1270] – *Operation of certain instruments ([CO 05/1270])* in order to overcome uncertainties about the legal effect of specific Class Orders, including [CO 04/1574], that resulted from the *Legislative Instruments Act 2003* (the **LIA**) coming into effect on 1 January 2005. [CO 05/1270] had the effect of granting the relief that was set out in particular Class Orders, including [CO 04/1574], subject to the terms of the Class Orders listed in [CO 05/1270].

Subparagraph 6(f) of [CO 05/1270] refers to [CO 04/1574]. As [CO 04/1574] was not registered on the Federal Register of Legislative Instruments under the LIA, the operation of [CO 04/1574] will cease if the cross-reference in subparagraph 6(f) of [CO 05/1270] is omitted.

Due to the operation of [CO 05/1270], the relief set out in [CO 04/1574] is due to lapse, or to ‘sunset’, under the LIA on 1 April 2016. After considering feedback received in response to ASIC Consultation Paper 232 – *Remaking ASIC Class Orders on superannuation: [CO 04/1574] and [CO 06/636] (CP 232)*, ASIC will continue the substantive effect of the relief set out in [CO 04/1574], subject to some minor and technical changes, in a new legislative instrument. As a result, it is unnecessary to retain subparagraph 6(f) of [CO 05/1270] in order to give effect to the relief detailed in [CO 04/1574].

[CO 06/636] grants relief to the trustee of a superannuation fund to allow the trustee to rely on a modified form of the Product Disclosure Statement (**PDS**) requirements in Part 7.9 of the Act. This relief operates when a superannuation fund gives a member a choice of investment strategy under which an accessible financial product may be acquired. In this scenario, [CO 06/636] allows the superannuation trustee to choose one of three options to provide product disclosure information to a member.

Under the LIA, [CO 06/636] is due to sunset on 1 October 2016. After considering the responses received to CP 232, ASIC will issue a new instrument that continues the substance of the relief set out in [CO 06/636], subject to some non-substantive changes. Accordingly, [CO 06/636] serves no purpose and ought to be repealed.

Under Pt 2M.3 of the Act, disclosing entities, public companies and large proprietary companies must prepare, lodge and distribute to their members their annual accounts and

certain reports. The law provides no automatic exemption to these requirements when a company is under any form of insolvency administration – the financial reporting obligations are imposed on the company. ASIC provided interim relief from these obligations in ASIC Class Order [CO 02/968] *Interim relief from financial reporting obligations for companies in external administration* ([CO 02/968]).

Under LIA, [CO 02/968] is due to lapse on 1 April 2017. [CO 02/968] grants financial reporting relief, subject to conditions, for various forms of externally administered companies whose financial years and half-years ended on or before 31 May 2003. The interim relief required that companies relying on [CO 02/968] perform any financial reporting obligations for financial years or half-years that ended on or before 31 May 2003, by 1 September 2003 at the latest. Accordingly, [CO 02/968] no longer serves any purpose and ought to be repealed

## **2. Purpose of the instrument**

The purposes of the Repeal Instrument are to:

- (a) amend ASIC Class Order [CO 05/1270], which gives legal effect to the terms of the relief set out in [CO 04/1574], in order to cease the operation of [CO 04/1574]; and
- (b) repeal [CO 02/968] and [CO 06/636].

## **3. Operation of the instrument**

Paragraph 1 of Schedule 1 of the instrument omits subparagraph 6(f) from [CO 05/1270], which refers to [CO 04/1574]. The effect of this change is to cease the legal effect of [CO 04/1574], effectively repealing [CO 04/1574].

Paragraph 1 of Schedule 2 of the instrument repeals [CO 02/968].

Paragraph 2 of Schedule 2 of the instrument repeals [CO 06/636].

## **4. Consultation**

In June 2005, ASIC issued CP 232 in relation to [CO 04/1574] and [CO 06/636]. After considering the feedback received in response to CP 232, ASIC will issue new legislative instruments that will continue the substantive effect of [CO 04/1574] and [CO 06/636], subject to non-substantive changes being made to the terms of the relief. As a result, [CO 04/1574] and [CO 06/636] no longer serve any purpose. The Repeal Instrument has been issued to cease the effect of both Class Orders.

In August 2014, ASIC issued CP 223 *Relief for externally administered companies and registered schemes being wound up: RG 174 update* (CP 223). ASIC consulted on issues relating to the financial reporting obligations of externally administered companies and registered schemes that are being wound up. The key points from the feedback received in submissions are set out in ASIC's Report 434 – *Response to submissions on CP 223: Relief for externally administered companies and registered schemes being wound up- RG 174 update*. Financial reporting relief for various forms of externally administered companies and

registered schemes being wound up is now provided, subject to conditions, under *ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251* or on a case-by-case basis. ASIC did not consult specifically on [CO 02/968] because it no longer serves any purpose. The Repeal Instrument has been issued to cease the effect of [CO 02/968].

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **ASIC Corporations (Amendment and Repeal) Instrument 2016/66**

ASIC Corporations (Amendment and Repeal) Instrument 2016/66 (the **Repeal Instrument**) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview**

The Repeal Instrument modifies ASIC Class Order [CO 05/1270] – *Operation of certain instruments* in order to cease the effect of ASIC Class Order [CO 04/1574] - *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund (ICO 04/1574)*. [CO 04/1574] provides relief to the trustee of a superannuation fund from application form and cooling-off requirements under Part 7.9 of Corporations 2001 (the **Act**) in relation to an ‘intra-fund transfer’. Under the LIA, [CO 04/1574] is due to lapse on 1 April 2016. The Repeal Instrument should cease the effect of [CO 04/1574], via modifying [CO 05/1270], because ASIC will issue a legislative instrument in February 2016 that will continue the substance of the terms of [CO 04/1574], subject to non-substantive changes.

The Repeal Instrument will repeal ASIC Class Order [CO 06/636] - *Superannuation: Delivery of product disclosure for investment strategies (ICO 06/636)*. [CO 06/636] grants relief to the trustee of a superannuation fund to allow the trustee to rely on a modified form of the Product Disclosure Statement (**PDS**) requirements in Part 7.9 of the Act. This relief operates when a superannuation fund gives a member a choice of investment strategy under which an accessible financial product may be acquired. Under the LIA, [CO 06/636] is due to lapse on 1 October 2016. The Repeal Instrument should repeal [CO 06/636] because ASIC will issue a legislative instrument in February 2016 that will continue the substantive effect of [CO 06/636], subject to non-substantive changes.

The Repeal Instrument will repeal ASIC Class Order [CO 02/968] *Interim relief from financial reporting obligations for companies in external administration (ICO 02/968)*. [CO 02/968] grants financial reporting relief, subject to conditions, for various forms of externally administered companies whose financial years and half-years ended on or before 31 May 2003. The interim relief required that companies relying on [CO 02/968] perform any financial reporting obligations for financial years or half-years that ended on or before 31 May 2003, by 1 September 2003 at the latest. Under the LIA, [CO 02/968] is due to lapse on 1 April 2017. The Repeal Instrument should repeal [CO 02/968] because it no longer serves any purpose. Financial reporting relief for various forms of externally administered companies and registered schemes being wound up is now provided, subject to conditions,

under *ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251* or on a case-by-case basis.

### **Human rights implications**

This legislative instrument does not engage any of the applicable rights or freedoms.

### **Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.